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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MANUEL CEJA NAVA, Defendant and Appellant.	E069128 (Super.Ct.No. RIF1502845) OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed.

Eric E. Reynolds, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Manuel Ceja Nava[1] challenges the trial court's denial of his motion to set aside his 2015 guilty plea to a count of possession of a firearm while under the influence of a controlled substance. (Health & Saf. Code, § 11550, subd. (e).) The motion, made pursuant to sections 1016.5 and 1473.7 of the Penal Code[2] was bottomed on defendant's claim he would not have entered a guilty plea had he been fairly informed by the trial court and defense counsel of the immigration consequences of that action.

On appeal, defendant does not address section 1016.5, which requires the trial court to advise of a plea's immigration consequences for noncitizens and authorizes vacation of the conviction if the advisement is not given. He argues, however, that the court should have granted his motion pursuant to section 1473.7 because his counsel had not advised him that he was certain to suffer adverse immigration consequences as a result of his plea and because he had suffered harm as a result of that failure. We find no error and affirm.

BACKGROUND

Defendant is a Mexican citizen who has been living and working in the United States as an undocumented immigrant since 1995. He is the beneficiary of his brother's pending immigration petition filed in December 1995 to establish the familial

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[1] Defendant is referred to by several names throughout the record. We shall refer to him as Manuel Ceja Nava as does the abstract of judgment filed on July 19, 2016.

[2] All future statutory references are to the Penal Code unless otherwise noted.

relationship (Dept. of Homeland Security USCIS form, Form I-130), which is the first step in the process to become a lawful permanent resident. Defendant is married to an undocumented immigrant and has four living children born in the United States ranging in age from five to 16. A fifth child, his eldest daughter also born in the United States, was murdered in April 2017 at the age of 17.

In 2015, defendant, whose criminal history includes several convictions for drunk driving, was charged with four felony counts: being under the influence of a controlled substance while in the immediate and personal possession of a loaded operable firearm (Health & Saf. Code, § 11550, subd. (e), count 1); possession of methamphetamine at the same time he possessed a firearm (Health & Saf. Code, § 11370.1, count 2); owning or possessing a firearm while being an addict and a convicted felon (Pen. Code, § 29800, subd. (a), count 3); and being in possession of ammunition and reloaded ammunition (Pen. Code, § 30305, subd. (a), count 4). Conviction on any of those charges will result in deportation. (8 U.S.C. § 1227, subd. (a)(2)(B), (C); see *Padilla v. Kentucky* (2010) 559 U.S. 356, 368-369 (*Padilla*) [deportation for crimes specified in subdivision (a) of 8 U.S.C. section 1227 is presumptively mandatory].)

Defendant entered a plea of guilty on the first count in exchange for the dismissal of the three other charges and a sentence of 36 months of probation, including serving 180 days (eight days of credits and 172 days in a work release program). The agreement was set forth in a County of Riverside felony plea form signed by defendant, his counsel, the district attorney, and an interpreter who translated the form from English into Spanish

for defendant. Included on the form under a "Consequences of a Plea" heading was the statement, initialed by defendant: "If I am not a citizen of the United States, I understand that this conviction may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

In the course of the plea hearing, the trial court reviewed the signed form with the defendant and his counsel. Counsel agreed that there was a factual basis for the plea but, contrary to his statement on the plea form that he agreed with defendant's decision to plead guilty, counsel advised the trial court that he declined to join in the plea.

A year later, in June 2016, defendant pled guilty to possession of a handgun in violation of subdivision (a)(1) of section 29800 with respect to a new filing[3], and admitted a violation of his probation in the instant case. He was sentenced to the midterm of two years in state prison on each case, to run concurrently.

After being released from prison, defendant was taken into custody in March 2017 by the United States Department of Homeland Security's Immigration and Customs Enforcement (ICE) agents because of his undocumented status. Thereafter, he filed a motion pursuant to sections 1016.5 and 1473.7 to set aside the 2015 guilty plea on the basis that he was not fairly informed of the immigration consequences of his guilty plea. Defendant's declaration in support of his motion averred his counsel did not warn him the plea "could" lead to his deportation or exclusion and he did not recall whether the court

[3] Although not mentioned by the parties, we note that this violation is also a deportable offense pursuant to subdivision (a)(2)(C) of 8 United States Code, section 1227.

warned him that conviction "would" cause him problems in trying to legalize his immigration status. He stated he would have fought the charge or sought an alternative disposition had he been advised of the severe immigration consequences.

Defendant was still being held without bail in an ICE detention center in San Diego County when his motion to set aside the guilty plea was heard in August 2017. The only evidence submitted in support of the motion was defendant's declaration, which the court found to be unsubstantiated, uncorroborated, and not credible. The motion was denied on the basis that there was no credible evidence to support defendant's claim that he did not understand the adverse immigration consequences of his plea. Defendant appealed.

DISCUSSION

Defendant contends the trial court erred when it denied his motion to vacate his 2015 plea because he established by a preponderance of evidence that his counsel failed to advise him his plea would in fact subject him to deportation and that he suffered prejudice as a result of that failure. He also argues that the trial court based its denial on improper considerations concerning the underlying offense and defendant's character. Defendant's claims are unavailing.

A. Standard of Review

The People urge us to review the trial court's denial of defendant's section 1473.7 motion for an abuse of discretion. We decline to do so.

Where, as here, a defendant's section 1473.7 motion raises an issue of deprivation of the constitutional right to effective assistance of counsel, it presents a mixed question of law and fact subject to de novo review. (*People v. Cromer* (2001) 24 Cal.4th 889, 899-902; *In re Resendiz* (2001) 25 Cal.4th 230, 248-249 (*Resendiz*), abrogated on other grounds in *Padilla*, *supra*, 559 U.S. at p. 370 [ineffective assistance of counsel claim alleged in habeas corpus petition to withdraw plea presents a mixed question of law and fact]; *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116 (*Olvera*) [a section 1473.7 motion alleging deficient performance of defense counsel is reviewed de novo].)

When using a de novo standard, we defer to the trial court's factual determinations if they are supported by substantial evidence, but exercise our independent judgment in deciding whether the facts demonstrate deficient performance and resulting prejudice. (*Resendiz*, *supra*, 25 Cal.4th at pp. 248-249; *Olvera*, *supra*, 24 Cal.App.5th at p. 1116.)

And, in cases like the present one in which the issue on appeal concerns a failure of appellant's proof at trial, the substantial evidence analysis is conceptually and substantively different than in a case in which appellant's claim is that respondent prevailed despite a lack of sufficient substantial evidence. (*Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 965-966.) When reviewing a trial court's express or implied failure-of-proof finding, we review the record to determine whether the evidence presented at trial compels a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1074.) The appellant must

demonstrate that his affirmative evidence was uncontradicted and unimpeached, and of such character and weight, that that there is no room for a trial court determination that it was insufficient to support a finding in appellant's favor. (*Roesch*, at p. 571.)

In support of their claim that we should employ an abuse of discretion standard of review, the People cite *People v. Fairbank* (1997) 16 Cal.4th 1223 (*Fairbank*) and *People v. Asghedom* (2015) 243 Cal.App.4th 718 (*Asghedom*). Those cases, which do not involve section 1473.7, are not apposite here.

Asghedom involved a motion brought by a defendant pursuant to section 1016.5. That statute requires the trial court to advise a defendant of immigration consequences before accepting a guilty or no contest plea and authorizes a motion to vacate the judgment to permit withdrawal of the plea if the advisement is not given. (§ 1016.5.) A denial of that motion is properly reviewed using an abuse of discretion standard because it does not implicate the accused's constitutional rights. (*Asghedom, supra*, 243 Cal.App.4th at p. 724.)

Fairbank involved an appeal to the Supreme Court from a death sentence entered after the defendant pled guilty to a first degree murder charge. (*Fairbank, supra*, 16 Cal.4th at p. 1231.) Included in the issues raised on appeal was whether the trial court erred when it denied the defendant's section 1018 motion to withdraw his guilty plea. (*Fairbank*, at pp. 1252-1254.) Unlike a motion pursuant to section 1473.7, which requires the trial court to vacate the conviction if the defendant meets the requisite burden of proof, section 1018 provides that, if counsel was present at the time of the plea, the

trial court "may" upon a showing of good cause permit withdrawal of the plea if the motion is made prior to judgment (or within six months after an order granting probation if entry of judgment is suspended).

Fairbank's motion was bottomed on his claim that he was intoxicated when he entered his plea. (*Fairbank*, *supra*, 16 Cal.4th at pp. 1252-1253.) The Supreme Court, noting that the decision to grant the motion rested in the discretion of the trial court, found there was no abuse of that discretion in denying the motion. (*Id.* at p. 1255.) Substantial evidence, which included the trial court's observations that Fairbank was not intoxicated when the plea was entered, supported the determination that he had not met his burden of showing he made the plea unknowingly. (*Id.* at pp. 1253-1254.) His argument on appeal that his motion had "*implicitly*" involved an issue of ineffective assistance of counsel because his attorney did not report his intoxication to the trial court was rejected. (*Id.*, at p. 1254.)

Here, defendant's motion to vacate his 2015 guilty plea is reviewed de novo because it was bottomed on his claim that his attorney's performance was deficient, thereby implicating a constitutional issue.

B. The denial of the section 1473.7 motion

Defendant argues the trial court erred when it denied his motion to set aside his plea pursuant to section 1473.7 because the plea form and his declaration established his counsel's failure to advise him that he was certain to suffer the adverse immigration consequences articulated in the felony plea form and that he would not have entered a

guilty plea had he understood that doing so would result in certain deportation. He also contends that the trial court relied on improper and irrelevant factors in making its decision. We disagree and affirm.

In relevant part, section 1473.7 authorizes a person who has been released from prison to move to vacate a conviction or sentence that is legally invalid due to a prejudicial error that resulted in damage to the person's ability to understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of entering a guilty plea. (§ 1473.7, subd. (a)(1).) If the error and resulting prejudice are established by a preponderance of evidence, the court must grant the motion to vacate and allow the defendant to withdraw the plea. (§ 1473.7, subd. (e)(1), (3).)

One error giving rise to a claim that a person did not understand or knowingly accept the adverse immigration consequences of a guilty plea occurs when defense counsel fails to provide competent, accurate, and affirmative advice about those consequences. (*Padilla*, *supra*, 559 U.S. at pp. 367, 369 (*Padilla*)[4]; *People v. Espinoza* (2018) 27 Cal.App.5th 908.) To establish ineffective assistance of counsel, a defendant must demonstrate by a preponderance of evidence not only that the defense attorney's performance fell below an objective standard of reasonableness but also that it caused the

[4] The Legislature codified the rule established by *Padilla* by enacting section 1016.3 (effective January 1, 2016), which provides in pertinent part that "Defense counsel shall provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards, defend against those consequences." (§ 1016.3, subd. (a).)

defendant to be prejudiced. (*Lee v. United States* (2017) ___ U.S. ___ [137 S.Ct. 1958, 1964] (*Lee*); *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) The nature of the advice required to be given to a noncitizen criminal defendant facing immigration consequences depends on the likelihood that the adverse consequences will in fact occur. If the law is not clear concerning the immigration impact of a conviction, then counsel need only advise the defendant that the guilty plea *may* result in deportation, exclusion from admission to the United States, or denial of naturalization. (*Padilla*, *supra*, 559 U.S. at p. 369.) But, in cases such as the present one, in which the law is clear that the conviction *will* result in those negative immigration consequences, counsel must advise the client of the virtual certainty of that outcome. (*Ibid.*)

Defendant claims the plea form and his declaration in support of his motion establish by a preponderance of evidence the failure of his counsel to advise him that conviction in his case was certain to result in adverse immigration consequences. His claims are unavailing.

It is true, as defendant posits, that the plea form provided by the trial court warns only that conviction *may* result in deportation, exclusion, and loss of the chance for naturalization.[5] But, contrary to defendant's contention, the fact he was informed of the

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[5] We note with approval that, in May 2018, the Judicial Council of California revised and approved for optional use a felony plea form that includes a statement for consideration that a defendant who is not a citizen of the United States understands that a plea of guilty of no contest "may or, with certain offenses, **will** result in my deportation, exclusion from reentry to the United States, and denial of naturalization and amnesty . . . . The offenses that **will** result in such immigration action include, but are not limited to, an aggravated felony, conspiracy, a controlled substance offense, a firearm offense, and

possibility of those adverse ramifications does not evidence failure on the part of his counsel to advise him the charge to which he was pleading guilty was one of the offenses that, pursuant to federal immigration law, *will* result in adverse immigration consequences.

The only evidence introduced by defendant in support of his motion was his declaration, which included statements that counsel did not tell him a guilty plea could lead to his deportation or exclusion and that he did not recall discussing with counsel any possible immigration issues, including his pending immigration petition. The trial court found the declaration to be self-serving, not credible, and without corroboration. It observed that the transcript of the plea hearing reflected defendant was assisted by a certified Spanish language interpreter when he entered the plea, and he responded in the affirmative and unequivocally when the court asked if he understood the various sections of the plea form and whether he had reviewed them with his attorney.

We defer to the trial court's resolution of factual conflicts, regardless of whether the evidence is oral or documentary. (See *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fn. 3; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479; but see *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 79-80 [when trial court's decision is based upon writings instead of live testimony, its credibility finding as to the documents

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under certain circumstances, a moral turpitude offense." (Judicial Council Forms, form CR-101 [Rev. May 25, 2018].)

is not entitled to deference but, in all events, neither the law or the record supported the conclusion that Ogunmowo was not prejudiced].)

Defendant asserts that the trial court's decision not to vacate the conviction was improperly bottomed on observations concerning his character and the circumstances of the underlying offenses (getting caught driving while high on drugs with a shotgun in the car and, later, getting caught again for the same offense). He points to the trial court's statements made in the course of the hearing in which it points to that history and remarks to the effect that defendant should not place blame for his pending deportation on his counsel (who was known to the court and was a supervisor in the public defender's office), and that defendant had no one to blame for his predicament but himself.

It is true that the court's observations about defendant, including mention of his getting caught twice for the same illegal acts, that his pending deportation was a result of what defendant "chose to do," and that "the record reflects [defendant] may not be the best potential citizen." It is not true, however, that the court based its decision to deny defendant's motion on those considerations. As explained *ante*, the denial was bottomed on the court's finding that defendant had not presented credible evidence to establish that he did not understand the potential immigration consequences of his plea because he had not been properly advised of them.

Accordingly, we find there was no evidence before the trial court that compelled it to grant defendant's motion.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.